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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 229

In the Matter of
JEFFREY FISCHER,
a minor.

ALTERNATIVE MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT OF LOWER COURT.

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TABLE OF CONTENTS.

I. Alternative Motion to Dismiss Appeal or Affirm Judgment of Lower Court 1

II. Appellant's Statement as to Jurisdiction 1

III. Statement of Facts Proven by Evidence 2

IV. The Statement as to Jurisdiction Made by the Appellant 6

V. Questions Presented by Appellant 6

VI. The Law Applicable to This Case 12

TABLE OF AUTHORITIES.

Cases.

Darnell, In re, 173 Oh. St. 335 2

Gault, Gerald Francis, a minor, In the Matter of, 35 U. S. Law Week 4399 ..... 12, 13, 14, 15

Statutes.

Ohio Revised Code:

Sec. 2151.21 6

Sec. 2151.26 ..... 2, 8

Sec. 2151.27 6

Sec. 2151.35 2

Sec. 2153.16 6

Sec. 5139.01 6

Sec. 5139.03 6

Sec. 5139.05 6

Sec. 5139.06 6

Sec. 5139.14 10

Sec. 5139.15 10

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I. ALTERNATIVE MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT OF LOWER COURT.

The State of Ohio, appellee herein, moves in the alternative that this appeal be dismissed or that the judgment of the lower Court be affirmed by this Court on the following grounds:

1. That the appeal does not present a substantial federal question.
2. That it is manifest that the questions on which the appeal of the cause depends are so unsubstantial as not to need further argument.

II. APPELLANT'S STATEMENT AS TO JURISDICTION.

This statement in appellant's brief is erroneous in that it states that Jeffrey Fischer was "sentenced" to "*indefinite*" commitment to The Ohio Youth Commission. At the time this case was concluded in the Juvenile Court Jeffrey Fischer was 18 years of age. He was not

found by the fireman in charge of putting out the fire just where Jeffrey had said it was. Mr. Shapiro also confirmed the fact that this box of cancelled checks was where Jeffrey said it was (R. 83, 84). The fireman also confirmed the evidence as to the box of cancelled checks (R. 94, 95). (See also R. 91 and R. 1257.) Jeffrey was at home when both these fires were *discovered*. He had just returned.

(3) *Sheber Fire*: 2624 Milton Road, at about 10 p.m. on July 23rd, 1964, Jeffrey said he threw a lighted match on a desk in the garage that had some papers on it (R. 319). The remains of a desk were found in the garage after the fire. Also charred paper. At the time of the Sheber fire, Jeffrey had just returned from taking a friend, Alan Richman, home. Jeffrey testified that he told Detective Carr that he started this Sheber fire with a cigarette lighter and a stick of wood. This, Detective Carr flatly denies (R. 359). Also R. 1199, 1200 and 1260. Fireman Pflueger who had charge of putting out this fire said the charred desk was found after the fire and that in his opinion that was where the fire started (R. 194, 195).

(4) *Fischer Fire*: 2620 Milton Road, July 30th, 1964 at about 10:40 p.m. Jeffrey said he was home and 'snuck' downstairs (R. 319, 320) and out the side door and threw a lighted match into a carton or can of old clothes. In his confession Jeffrey said he started the Fischer fire to take suspicion off himself (R. 234). This receptacle of charred old clothes was found in the Fischer garage after the fire was put out where Jeffrey said it was. Just before this fire started Mrs. Fischer was preparing refreshments for guests named Brahms, who strangely were never called to testify for Fischers, though available for testimony. Mrs. Fischer did not see the fire in their garage till it was well advanced. Mr. and Mrs. Fischer made conflicting

statements as to curtains being drawn over the rear windows. It was impossible for Mrs. Fischer to have been watching Jeffrey every minute that night. It would only have taken Jeffrey about two minutes to start this fire and get back into the house. Lieutenant Joseph Duffy of University Heights Fire Department attended the Fischer fire. He testified that it was a "started" fire originating in rubbish containers (3) (R. 265 to 270). See also testimony of Fire Chief Benjamin (R. 264 to 270). See especially R. 235.

All of the firemen and fire experts who examined these garages testified that all of these garage fires were "set fires" and not accidents. See R. 2055, 2074, 2077, 2078 and 2081. The defendant has no evidence from any expert that materially conflicts with this testimony. See R. 301 to 318.

The details of the starting of these fires and the materials with which they were started as described by Jeffrey Fischer were found by police, firemen, fire experts and garage owners immediately after each of said fires. The following witnesses gave very clear testimony that all of the concerned fires were "set fires" *and* as to how they were started.

Paul Shapiro (garage owner) (R. 83);
Richard Lotz (fireman) (R. 95, 96);
Frances Sheber (garage owner) (R. 128, 144, 145, 146);
J. G. Pflueger (fireman) (R. 193, 195, 220, 222);
Detective Ralph Schaar (police) (R. 232 to 256);
Detective Joseph Duffy (police) (R. 264, 280);
Sgt. Philip Carr (police) (R. 287 to 387);
Policeman Donald Stehlick (R. 484, 485, 486, 501, 502);
Fire expert Merle Mitton (R. 532, 540, 584);

Carl B. Tinkham, Asst. Ohio Fire Marshal (R. 587, 629, 630, 637);

Fire Chief Benjamin of University Heights (R. 630, 666, 667, 669, 670, 671).

These witnesses corroborated in detail the facts stated by Jeffrey Fischer in his voluntary confession to Detective Carr.

IV. THE STATEMENT AS TO JURISDICTION MADE BY THE APPELLANT.

Appellant states that Jeffrey Fischer was sentenced to "*indefinite* commitment to the Ohio Youth Commission." This is *not* true because, when ordered committed to said Youth Commission, Jeffrey was 18 years old. Under the laws of Ohio the order of a Juvenile Court involving a juvenile expires when the juvenile becomes 21 years of age and is no longer a juvenile. The Ohio Youth Commission is essentially a rehabilitational institution, not criminal. See Ohio Revised Code Secs. 5139.01, 5139.03, 5139.05, 5139.06. There is no permanent commitment to The Ohio Youth Commission. The Juvenile Court had proper jurisdiction to try this case. Ohio Revised Code Secs. 2153.16, 2151.21, 2151.27.

V. QUESTIONS PRESENTED BY APPELLANT.

Was Jeffrey Fischer deprived of his Constitutional rights because he made a detailed confession to policeman Carr (after a lie detector test) which was admitted in evidence when the minor:

1. Was not represented by counsel.
2. Was not advised of his right to have counsel.
3. Was not advised of his right to remain silent.

4. Was not advised of his right against self-incrimination.

When the police investigated these garage fires they talked to every child and young person in the neighborhood as the evidence clearly shows and their suspicion centered on Jeffrey Fischer alone. The police went to the Fischer home and asked to talk to Jeffrey at the police station. Jeffrey and his parents consented voluntarily. The conference was had but Jeffrey was very evasive. His mother was there. This was done a second time after consent of Jeffrey and his mother. This time also Jeffrey was very evasive. His mother was not there, but she brought him there. On both occasions the police were very good and gentle with Jeffrey as he admits. After the second talk with Jeffrey the police went to Fischer's house and talked to both his parents and Jeffrey. They all agreed in writing to allow Jeffrey to take a lie detector test. It was given with parents present in the building, but it produced no results as Jeffrey was very evasive. Then the police again went to Fischer's house and procured from Mr. and Mrs. Fischer and Jeffrey the written consent to the second lie detector test. In all these conferences the police were most kind and gentlemanly with all the Fischers as the evidence *clearly* shows. At the last lie detector test it appeared that Jeffrey did start these garage fires, but neither Jeffrey nor his parents were told of that fact. At the close of the last lie detector test Detective Schaar said kindly to Jeffrey that if he did start these fires he should admit it and get it off his conscience so it wouldn't continue to bother him. *Then Jeffrey told Detective Schaar that he did start these fires.* Schaar questioned Jeffrey no further but called in policeman Carr. Before Carr questioned Jeffrey, Mr. and Mrs. Fischer and Fire Chief Benjamin went into an observation room next to the question-

ing room where they could see into the questioning room and hear the questioning, but could not be seen from the questioning room. *After the parents were in the observation room Carr questioned Jeffrey most kindly and Jeffrey confessed in detail as to each of the concerned garage fires.* Jeffrey and Jeffrey's parents also consented to policeman Carr's questioning of Jeffrey. The questioning by Carr lasted only half an hour or less.

When Carr's questioning was over Mr. and Mrs. Fischer came into the room and complimented Carr about being so kind to Jeffrey. Carr asked for a written statement from Jeffrey but the parents refused it. *The parents took Jeffrey on a trip to New York and en route Mrs. Fischer telephoned Carr and again complimented him on his treatment of Jeffrey during the confession interview.* Jeffrey's detailed confession is supported and corroborated in detail by the ten witnesses hereinbefore mentioned whose testimony is in the record. *No force, threats or undue pressure of any kind were used on Jeffrey to obtain his confession; and since his confession is corroborated in detail by ten (10) reliable witnesses as to details of fire setting, how can there be any reasonable doubt of the fact that Jeffrey did start these fires? Moreover, in this case the Fischers were most fortunate indeed that Juvenile Judge Whitlach did not refer this case to the grand jury and Common Pleas Court as a felony, which he had a legal right to do under Ohio Revised Code, Sec. 2151.26.* What Jeffrey did is no petty act of juvenile delinquency.

We now come to the specifics of the questions presented by appellant on page 3 of appellant's brief. Appellant contends that:

1. Jeffrey "*was not represented by counsel.*"

2. "Was not advised of his rights to have counsel."

Jeffrey was respresented by counsel *before* and *during* trial and in all subsequent proceedings. As every one knows a minor living with his parents is legally in their custody. In this case the police had the *full consent* of the parents *and* Jeffrey before *every* questioning of Jeffrey, and the parents complimented the concerned police on their fine treatment of Jeffrey. These parents could have had counsel at any time, but whether the police told them so or not does not destroy their consent, and Jeffrey's, to the concerned questioning. *As it was they knew enough to get legal counsel before trial and did so.* Jeffrey testified that he and his parents talked this whole matter over *with counsel before* trial. Thereafter all the Fischers denied what Jeffrey had voluntarily admitted. Jeffrey's parents are intelligent, educated people and Mr. Fischer has a very good business. *In his confession Jeffrey told policeman Carr that he "hated" his parents because they were too dominating and restrictive; that he couldn't leave the house without their permission.* Mrs. Fischer is a very dominant person. During the trial of this case she tried to influence witnesses on both sides of the case by shaking and nodding her head at them to get answers that she wanted. This was repeatedly objected to by the State and the Court ordered her to stop it, but she did not do so.

This case is truly in all respects a civil case, by statute, in Ohio, despite the fact that it could have been a criminal case. There is no duty as to counsel in a civil case such as obtains in a criminal case. *No court has any right to infringe upon the proper rights and powers of legislatures. Even aside from the Ohio statutes, this is purely a civil case. No such Constitutional rights as those contended for by appellant apply to civil cases.* A mere factual examination of this case shows no undue risk or maltreatment of appellant in any way. In fact never

have we seen a case where a juvenile and his parents have been more carefully and kindly dealt with than in this case. *The Juvenile Court in this case gave no indefinite judgment and there was no "sentence" to any penal institution, nor was there even any penal restriction.* Children assigned to the Ohio Youth Commission go to public schools, have medical and psychiatric treatment, engage in athletics and have entertainment. They may be visited by their families and friends frequently. If they are incorrigible some other disposition may be made of them but if they act reasonably they stay there until released by becoming of age or by order of the Commission. See Ohio Revised Code Secs. 5139.14, 5139.15 and following sections.

This case shows no illegal or undue restraint or restriction or any unfairness. It clearly shows that these parents and Jeffrey were very fortunate indeed to receive such kind, fair treatment. But this means nothing to them now. *Jeffrey repeatedly exercised his right to refrain from admitting his guilt until he voluntarily confessed with his parents watching him. He did not confess until he decided to do so.* No one did anything to impair or stop the exercise of his constitutional rights.

5. *"That Jeffrey had been under psychiatric treatment for more than one year prior to the confession, his illness consisting of guilt feelings for acts he did not commit."*

This statement is not a fact. No psychiatrist testified as above stated. If Jeffrey was under any pressure before he confessed it was caused *only* by *his* natural *factual guilt feeling.* Whether police are present or not, if a confession is voluntary and true and there is no improper concealment, pressure, threats or violence, then such confession is proper and must stand. To hold otherwise is to uphold

and favor wrongdoing and unduly and improperly restrict government in its protection of its citizens and proper standards of living.

The defense in this case had produced no evidence worth mentioning in support of its side of this case. For example, of all of the defense witnesses in this case there were 30 of which *not one* gave *any* testimony for defense that involved *any* issue or material facts in this case. Only their psychiatrist and the Fischer family gave any really pertinent testimony. Their phychiatrist, Dr. Woldman, repeatedly said that psychiatrists can easily be wrong and there is no assurance as to how a person will act under repeated circumstances; that there are times when psychiatrists cannot get all the information in a patient's mind; that if Jeffrey gave details of these fires that are backed up by corroborative evidence "sure it is possible that he started those fires"; that people tend to repeat offenses they commit and that many people who do wrong find relief in confession (R. pp. 423 to 452). Dr. Woldman was a defense witness and is Jeffrey's psychiatrist. Two other state psychiatrist witnesses testified substantially the same. *These psychiatrists never said that Jeffrey did or would testify to anything "because of guilt feelings as to things he did not do."*

6. *"Testified that his confession was not truthful and was not given voluntarily."*

All the evidence in this case except that of Jeffrey and his parents is contrary to this above quoted statement. If Jeffrey's confession were not true how could it be supported in detail by eleven witnesses, some of whom are experts in determining the cause of fires? *Moreover these witnesses saw the concerned garages right after the fires and found in each of the garages the combustible material that Jeffrey said he started the fires with, and found it in*

that part of each garage where Jeffrey said it was. There is no doubt that true feelings of guilt pressure caused Jeffrey to confess.

7. *"There was no other evidence against appellant except the alleged confession."*

The record specifically shows the contrary as above explained. Eleven witnesses for the appellee gave specifically corroborative evidence supporting Jeffrey's confession.

VI. THE LAW APPLICABLE TO THIS CASE.

It is *not* true that "Jeffrey's illness was that of immense guilt for things he did *not* do and things over which he had no control" and the testimony quoted on page 54 of appellant's "statement as to jurisdiction" does *not* so state. *No psychiatrist ever gave any such testimony in this case.* Appellant's parents obviously made Jeffrey deny his confession, which was wholly voluntary when made with parents' consent. Applicant had legal counsel for some time before the trial started. It is completely untrue that, as appellant says, "there was no other evidence against appellant other than his confession." It is not true that appellant has been sentenced "indefinitely" to The Ohio Youth Commission. Appellant is now 19 years old or very close to it.

In the *Gault* case* there was a verbal complaint that the juvenile, age 15 years, had made lewd telephone calls. The boy was picked up without consulting, or notifying his parents and put in a detention home. A petition against the boy was filed in Court which made no reference to facts charged but stated only that the boy was a delinquent. There was an affidavit with the petition. On the

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* *In the Matter of Gerald Francis Gault, a minor*, 35 U. S. Law Week 4399.

same day the police and the boy (without parents) appeared before the Juvenile Court. Gerald was questioned and a police officer testified. Gerald confessed to part of the charges. Then a second hearing was had at which Gerald's parents were present, but not the complainant. The Judge committed Gerald to the state industrial school until he was 21 years old. The case was appealed and the judgment reversed by this Court.

In its opinion this Court said:

> "We do not even consider the entire process relating to juvenile delinquents. For example we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post adjudicative or dispositional process."

It is therefore indisputable that the decision in the *Gault* case applies only to proceedings before the Juvenile Court and *not* to any prior matters, such as police action, before trial. Only a Court can determine or decide whether or not a juvenile is a delinquent. This Fischer case involves matters that happened before and during trial.

After making the above quoted statement in the *Gault* case, the United States Supreme Court then proceeded to decide the appeal on the following four principal grounds:

1. "* * * that the assistance of counsel is essential for purposes of waiver proceedings, so we hold now that it is equally essential for the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21."

In the Fischer case the appellant has had full benefit of counsel for some time before trial, all the time during trial and ever since trial was concluded. Before and when

Jeffrey Fischer confessed, all his examinations had the full notification and express consent of his parents and himself. His parents were at all times his legal custodians. He was in *no* way abused, threatened, misled or taken advantage of. The police were unusually kind to him and very careful. They were thanked therefor by his parents. The record contains no timely objection to the admission of Jeffrey's confession in evidence. He was allowed to and did exercise his right to refuse to confess until he voluntarily did so.

2. *"We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel the counsel will be appointed to represent the child."*

This ruling has no bearing whatever on the Fischer case because said juvenile had legal counsel before the trial, at the trial and has had legal counsel ever since the trial. Moreover at trial he was confronted with all the appellee's witnesses and they were all cross-examined by appellant's counsel.

3. *"Before being interviewed the child and his parents should be informed of his right to have legal counsel present and to refuse to answer questions or be fingerprinted if he should so desire."*

Since this Court has stated that the *Gault* opinion applies only to judicial process and *not* to pretrial or post-trial matters and since Jeffrey Fischer and

his legal custodian parents consented to all interrogation (at all of which Jeffrey *exercised* his right to confess or not to do so) and had counsel prior to and at his trial, and since the police were *very* fair and kind in their treatment of Jeffrey it is submitted that no violation of this ruling in the *Gault* case has occurred in the Fischer case. Moreover, considering the magnitude of Jeffrey's illegal acts and the losses they caused, Jeffrey and his parents are very fortunate that this case was not turned over as a criminal case to the Common Pleas Court by Judge Whitlach.

4. *"Juvenile proceedings to determine delinquency which may lead to a commitment to a state institution must be regarded as criminal for purposes of the privilege against self incrimination."*

In this case no illegal means was used to obtain Jeffrey's confession. He and both his parents consented in writing, his parents viewed and heard his confession, which was purely voluntary, and complimented the police for their kindness to Jeffrey. Not even the psychiatrists said there was anything wrong with it. Jeffrey's parents were and are his legal guardians and custodians. By express provisions of Ohio statutes this is not a criminal proceeding.

Even if the herein concerned proceedings were, or are, criminal it is submitted that the evidence plainly shows that no Constitutional rights were violated; that appellant has, at all times concerned, been very fairly and considerately treated; that his confession is clear, adequate and was properly obtained and supported by adequate corroboration. Pending final decision Jeffrey Fischer is still living at home and has never been confined, nor is there any order for his imprisonment nor has there ever been any such order.

In conclusion we wish to say that after reading the rules of this Court and knowing the heavy pressure under which this Court operates we have cited very few references to the record but will be glad to furnish to this Court any parts of the record relating to any statements herein that the Court wishes to see, hoping that by so doing we may reduce the work of the Court. We can substantiate from the record *all* facts and evidence herein mentioned.

It is submitted that this appeal should be denied.

Respectfully submitted,

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